

**THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	<b>O P I N I O N</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NO. 2008-L-128</b>
DAVID A. MULL,	:	
Defendant-Appellant.	:	7/24/09

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 06 CR 000805.

Judgment: Affirmed.

*Charles E. Coulson*, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*Rhys Brendan Cartwright-Jones*, City Center One Building, 100 Federal Plaza East, #101, Youngstown, OH 44503 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, David A. Mull, appeals the Judgment Entry of the Lake County Court of Common Pleas, in which the trial court denied Mull's Motion to Withdraw his guilty plea. For the following reasons, we affirm the decision of the trial court.

{¶2} On November, 8, 2006, a Mentor police officer observed Mull commit various lane violations. Mull began to pull over on his own accord when the officer activated his lights and approached Mull's vehicle. The officer noticed that Mull had a strong odor of alcohol on his breath and had slow, slurred speech. Mull failed multiple sobriety tests and was asked to submit to a breathalyzer; however, he refused.

{¶3} An indictment was filed and Mull was charged with Operating a Vehicle While Under the Influence of Alcohol, in violation of R.C. 4511.19(A)(1)(a), with the specification that he had previously been convicted of, or pleaded guilty to, five or more violations of R.C. 4511.19(A) or (B) within 20 years, constituting a felony of the fourth degree; Operating a Vehicle While Under the Influence of Alcohol, in violation of R.C. 4511.19(A)(2), with the specification that he had previously been convicted of, or pleaded guilty to, five or more violations of R.C. 4511.19(A) or (B) within 20 years, constituting a felony of the fourth degree; and Failure to Drive in Marked Lanes, in violation of R.C. 4511.33, a minor misdemeanor.

{¶4} Mull waived his right to be present at his arraignment and the trial court entered pleas of "not guilty" to all the charges on his behalf. Mull then filed a Motion to Suppress, claiming that there was no probable cause or specific and articulable facts warranting his arrest, which the court subsequently denied.

{¶5} On April 27, 2007, Mull withdrew his former not guilty plea and entered a plea of guilty to one count of Operating a Vehicle Under the Influence of Alcohol, a felony of the fourth degree, and a specification pursuant to R.C. 2941.1413 stating that Mull had five or more prior OVI convictions in the last 20 years. The remaining two charges were dismissed.

{¶6} After a sentencing hearing, Mull was sentenced to serve a term of incarceration of 24 months at the Lorain Correctional Institution, with credit for time served. Furthermore, he was sentenced to serve an additional term of two years as a mandatory prison term for the OVI specification, to be served consecutive to the aforementioned term. Mull was further ordered to pay a mandatory fine of \$800, his driver's license was suspended for ten years, six points were to be assessed to his driving record, his vehicle, which he was operating at the time of the offense, was to be forfeited, and he was ordered to enter and successfully complete the drug/alcohol program while incarcerated.

{¶7} Approximately 15 months after pleading guilty, Mull, acting pro se, moved to withdraw his guilty plea pursuant to Crim.R. 32.1, claiming that his counsel was ineffective by failing to address Mull's mental and emotional impairment due to his alcoholism. He also asserted that his attorney failed to pursue falsehoods in the police report and that his plea of guilty was not knowing, voluntary and intelligent, since he received a longer sentence than he expected.

{¶8} The trial court denied Mull's pro se motion without a hearing. The court held that Mull's post-sentence Motion to Withdraw was "barred by the doctrine of res judicata" because "Mull could have raised his claims of ineffective assistance of counsel in a direct appeal." Moreover, the court found that "[e]ven if not barred by the doctrine of res judicata, \*\*\* Mull has not met his burden of showing manifest injustice."

{¶9} Mull, acting pro se, timely appealed and raised the following assignments of error:

{¶10} “[1.] Trial court erred when it accepted appellant’s guilty plea without making a meaningful determination whether or not appellant’s plea was knowing, voluntary, or intelligently [sic] or whether appellant fully understood the penalties of his sentence.

{¶11} “[2.] Trial court [sic] was ineffective by allowing the trial court to sentence appellant as a probation violator when in fact he was not under any form of supervision at the time [of the] alleged offense.

{¶12} “[3.] Trial court erred when it denied appellant’s motion to withdraw guilty plea upon breach of plea agreement.

{¶13} “[4.] When viewing the totality of circumstances surrounding appellant’s plea hearing, counsel failed to advise appellant of all waivers involved in a guilty plea.

{¶14} “[5.] The trial court erred when it failed to abide by the recommended sentence appellant understood he would receive.

{¶15} “[6.] Appellant was denied effective assistance of counsel during the plea and sentencing phase.

{¶16} “[7.] Counsel was ineffective by not discussing the PSI report with appellant and the trial court erred by failing to inquire in open court if appellant and counsel reviewed the PSI report or if it contained false or misleading statements.”

{¶17} Mull subsequently filed a pro se Motion for Appointment of Counsel, which this court granted. We further ordered that Mull’s newly appointed appellate counsel would be granted leave to file a supplemental brief to Mull’s pro se brief.

{¶18} On February 13, 2009, Mull’s appointed appellate counsel filed a Motion for Leave to Withdraw, as counsel, on the grounds of counsel’s belief that “there are no

good grounds for appeal.” See *Anders v. California* (1967), 386 U.S. 738, 744, (“if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw”). Appellate counsel also filed an *Anders* brief in which he identified two possible assignments of error:

{¶19} “[1.] The trial court failed to comply with the Crim.R. 11 colloquy.

{¶20} “[2.] The trial court abused its discretion in disallowing Mull’s motion to withdraw his guilty plea.”

{¶21} Because of the similarities in Mull’s pro se arguments and the potential arguments of appellate counsel, we will consider them jointly. “However, when an *Anders* brief is filed, an appellate court is ‘required to conduct our own independent review for error.’” *State v. Corpening*, 11th Dist. No. 2005-A-0058, 2006-Ohio-5290, at ¶5 (citations omitted).

{¶22} Considering Mull’s first pro se assignment of error, Mull argues that his plea was not knowingly, intelligently, and voluntarily made. Correspondingly, Mull’s appellate counsel asserts non-compliance with Crim.R. 11 as one possible assignment or error for Mull. We agree with Mull’s appellate counsel, in that the trial court fully complied with Crim.R. 11 and this argument is meritless.

{¶23} “In accepting a written plea of no contest to a felony charge, the trial court must adhere scrupulously to the provisions of Crim. R. 11(C)(2).” *State v. Caudill* (1976), 48 Ohio St.2d 342, paragraph one of the syllabus. The purpose of Crim.R. 11(C)(2) is “to assure that the defendant is informed, and thus enable the judge to determine that the defendant understands that his plea waives his constitutional right to

a trial” and to “inform the defendant of other rights and incidents of a trial.” *State v. Ballard* (1981), 66 Ohio St.2d 473, 480 (citation omitted).

{¶24} Crim.R. 11 provides that “[i]n felony cases the court \*\*\* shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following: (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved \*\*\*[;] (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence[;] (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant’s favor, and to require the state to prove the defendant’s guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.” Crim.R 11(C)(2)(a)-(c).

{¶25} Mull claims that he “was not advised that by pleading guilty to a specification, the specification possesses the power to serve consecutive sentences.” He further asserts that the judge failed to mention the word “consecutive” at his hearing.

{¶26} “[T]he trial court must orally inform the defendant of the rights set forth in Crim.R. 11(C)(2)(c) during the plea colloquy for the plea to be valid. Although[,] the trial court may vary slightly from the literal wording of the rule in the colloquy.” *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, at ¶29.

{¶27} During the plea colloquy, the trial court informed Mull of the sentence he was facing, specifically the court stated: “Do you understand the charge you’re pleading

guilty to is a felony of the fourth degree and carries with it a maximum period in prison of 30 months potentially, and there is the specification that says I could impose a prison term of 1,2,3,4, or 5 years in addition to that 30 months in prison? Do you understand you're looking, in essence, at seven and a half years in prison as the maximum prison term that could be imposed on you? Do you understand that?" After which, Mull asked the court if he could stop for a minute. After an exchange between the judge and Mull's counsel and further explanation of the penalty to Mull, the judge asked if Mull understood the penalty. Mull replied, "Yeah, it's just hard to accept."

{¶28} Although the trial court did not mention the word "consecutive", the trial judge did relay to Mull that the term for the specification would be "in addition to the [potential] 30 months in prison" for the OVI charge.

{¶29} A review of the change of plea hearing transcript and Written Plea of Guilty in the present case demonstrates that the trial court adhered scrupulously to the provisions of Crim. R. 11(C)(2). The court addressed Mull directly, advising and explaining to him the elements of the crimes to which he was pleading, his right to trial, his right to representation, the State's burden of proof, his right to summon and confront witnesses, the privilege against self-incrimination, his right to appeal, the effect of a guilty plea, the potential prison terms, fines, and restitution, post release control and community control sanctions. The record clearly demonstrates that Mull was informed of the possible punishment he was facing upon entering a guilty plea and the plea was knowingly, intelligently, and voluntarily made.

{¶30} The first potential assignment of error and Mull's first assignment of error are without merit.

{¶31} Mull's second, fourth, sixth, and seventh assignments of error will be considered jointly. In the aforementioned assignments of error, Mull argues that he did not receive effective assistance of counsel; namely: his trial counsel failed to inquire about his mental condition, failed to explain the effects of his plea, and failed to review/correct errors in the presentence report (PSI).

{¶32} The Ohio Supreme Court has held that “[c]ounsel’s performance will not be deemed ineffective unless and until counsel’s performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel’s performance.” *State v. Bradley* (1989), 42 Ohio St.3d 136, at paragraph two of the syllabus, following *Strickland v. Washington* (1984), 466 U.S. 668. Moreover, “a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. \*\*\* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, \*\*\* that course should be followed.” *Id.* at 143, quoting *Strickland*, 466 U.S. at 697. To establish prejudice, a defendant must show that there exists a reasonable probability that, were it not for counsel’s errors, the result of the trial would have been different. *Id.* at paragraph three of the syllabus.

{¶33} Mull first claims that his trial counsel allowed the court to believe that Mull was on probation at the time of his violation. He claims that his trial counsel’s performance “fell below his professional responsibilities when he failed to obtain documentation proving [Mull] was not on probation at the time of the alleged crime in this matter.” However, it is apparent from the record that Mull’s trial counsel did bring the possible discrepancy to the trial court’s attention. His counsel stated the following to



the court at the sentencing hearing regarding Mull's probation: "just the matter we spoke about in chambers, Mr. Mull indicates that his probation in Willoughby Municipal Court for that prior DUI offense has been terminated, he believes about five months prior to the more recent OVI. We don't have proof of that, Judge. \*\*\* I just want to clear that up before hand." Although, the judge responded that the court is "still faced with the documentation \*\*\* that suggests otherwise," the court explicitly stated that the outcome would not have been any different whether or not he was on probation. The court stated, "I understand there's a dispute or disagreement with respect to that conclusion, but regardless of whether he was or was not on probation[,] this offense occurred shortly after the commission of a prior OVI for which he had not only been punished, but he had already gone to treatment for the alcohol related offense, and apparently didn't benefit from it." Therefore, Mull cannot demonstrate that the result of the sentencing hearing would have been different.

{¶34} Mull further claims that his trial counsel "neglected to explain all legal elements and ramifications of [his] guilty plea" which "precluded [Mull] from entering the plea knowingly and voluntarily. However, Mull's counsel relayed to the court that he "reviewed [the written plea of guilty] with him and [Mull] does wish to sign it." Moreover, based on the discussion above, the trial court fully explained the ramifications of entering a plea of guilty to Mull before it accepted his plea. Therefore, even if Mull's counsel failed to explain the consequences of a guilty plea, Mull can demonstrate no prejudice, as they were explained to him by the court and Mull chose to plead guilty.

{¶35} Mull also claims that he was suffering from a severe medication withdrawal at the change of plea hearing which affected his cognitive abilities.

However, when the trial court asked if Mull was under the influence of any drugs, alcohol, or medication at the hearing, Mull responded “No, sir.” Further, when asked if he had consumed drugs, alcohol, or medication within the last 48 hours, he also responded in the negative. There is nothing in the record indicating Mull was suffering from withdrawal. Therefore, his attorney was not ineffective for failing to inquire about Mull’s mental state.

{¶36} Additionally, Mull claims that his trial “counsel failed to stop the sentencing proceedings the morning [Mull] told [counsel] he remembered nothing of the Presentence Investigation report.” Further, his counsel was “ineffective by failing to investigate [Mull’s] claim that there was prejudiced information provided in the PSI.”

{¶37} During the sentencing hearing, Mull conveyed to the court that he didn’t recall the statements he made in the PSI report and that he “disagreed with those statements that [he] made.” Mull’s counsel acknowledged that Mull did not do a “good job on his presentence interview.” He attempted to mitigate Mull’s statements in his PSI report, stating that Mull “is having an extremely difficult time dealing with the weight of his situation” and “came off as flippant or disrespectful”, however, “he’s a different person” and is “very conscientious and concerned” about his actions.

{¶38} Mull is essentially complaining about his counsel’s trial strategy. “Strategy and tactical decisions exercised by defense ‘well within the range of professionally reasonable judgment’ need not be analyzed by a reviewing court.” *State v. Walker* (1993), 90 Ohio App.3d 352, 359 (citation omitted). Mull was neither prejudiced nor prevented from having a fair trial.

{¶39} Mull's second, fourth, sixth, and seventh assignments of error are without merit.

{¶40} In his third assignment of error, Mull claims that the trial court abused its discretion by overruling Mull's post-sentence Motion to Withdraw his guilty plea. He claims that the trial court was "aware that [Mull] was mislead by [the] state and trial counsel into believing he would first receive a fourteen month prison term or the maximum of three and a half years prison term that was recommended by the state." He maintains that "the manifest weight of injustice calls for allowing the withdrawal of [the] plea."

{¶41} Mull's appellate counsel also identifies the abuse of discretion of the trial court in disallowing Mull's motion as a possible assignment of error; however, he ultimately concludes it is without merit. Mull's appellate counsel stated that "Mull offered to the court neither competent nor credible evidence either of record or dehors the record that he suffered from a mental disease or defect that rendered him incapable of entering a knowing, voluntary, or intelligent plea. He offered his own conclusions on his mental state. \*\*\* [T]he trial court had discretion to deny the motion under Crim.R. 32.1." We agree.

{¶42} Crim.R. 32.1 states that "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

{¶43} For an appellate court to find an abuse of discretion in a case involving a denial of a post-sentence motion to withdraw a guilty plea, it must find more than an

error of judgment. It must find that the trial court's ruling was "unreasonable, arbitrary or unconscionable." *State v. Xie* (1992), 62 Ohio St.3d 521, 527, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶44} Therefore, after sentencing, a defendant has the burden of demonstrating the existence of manifest injustice to withdraw a guilty or no contest plea. *State v. Smith* (1977), 49 Ohio St.2d 261, at paragraph one of the syllabus. "The logic behind this precept is to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdraw the plea if the sentence was unexpectedly severe." *State v. Wynn* (1998), 131 Ohio App.3d 725, 728 (citation omitted). Since Mull filed his motion to withdraw his guilty plea after he was sentenced, he bore the substantial burden of demonstrating the existence of a manifest injustice. Crim.R. 32.1.

{¶45} "While a trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of a guilty plea if the request is made before sentencing, the same is not true if the request is made after the trial court has already sentenced the defendant. *Xie* [62 Ohio St.3d 521,] at paragraph one of the syllabus. In those situations where the trial court must consider a post-sentence motion to withdraw a guilty plea, a hearing is only required if the facts alleged by the defendant, and accepted as true, would require withdrawal of the plea." *State v. Gibson*, 11th Dist. No. 2007-P-0021, 2007-Ohio-6926, at ¶32 (citation omitted). "Generally, a self-serving affidavit or statement is insufficient to demonstrate manifest injustice." *Id* at ¶33.

{¶46} Mull waited over 15 months after being sentenced to withdraw his guilty plea. As mentioned above, he was informed of the maximum sentence at both the change of plea hearing and again at sentencing. He was specifically told that the trial

court would determine his sentence, and that the court was “not bound to accept any recommendations made by the Prosecutor or by [Mull’s] attorney at the time of \*\*\* sentencing.” “A defendant who has a change of heart regarding his plea should not be permitted to withdraw it merely because he received a harsher sentence than he subjectively expected.” *State v. Grigsby* (1992), 80 Ohio App.3d 291, 301 (citation omitted).

{¶47} Mull’s Motion to Withdraw his guilty plea failed to demonstrate the kind of “manifest injustice” necessary to establish a post-sentence motion to withdraw a guilty plea.

{¶48} Mull’s third assignment of error is without merit.

{¶49} Mull next asserts that the trial court erred by sentencing him to a non-minimum prison term, contrary to the holding in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *Foster* declared provisions of Ohio’s felony sentencing statutes requiring judicial factfinding before imposing a more than minimum sentence, maximum sentence, or consecutive sentences unconstitutional. *Id.* at paragraphs one and three of the syllabus (declaring R.C. 2929.14(B), (C), and (E)(4) unconstitutional). The *Foster* court further held that these provisions of the sentencing law were severable. *Id.* at paragraphs two and four of the syllabus. “After the severance, judicial factfinding is not required before a prison term can be imposed within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant” and “before imposition of consecutive prison terms.” *Id.*

{¶50} Therefore, after *Foster*, “[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings

or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Id.* at paragraph seven of the syllabus.

{¶51} Contrary to the cases asserted by Mull, in sentencing him, the trial court did not rely upon judicial factfinding, formerly mandated by statute, but now deemed unconstitutional and void by the Supreme Court of Ohio. Additionally, his sentence was within the statutory range.

{¶52} Mull's fifth assignment of error is without merit.

{¶53} After a thorough and independent review of the record, including the transcripts, and other submissions, we hold the trial court did not err in accepting Mull's plea, imposing sentence, or denying his Motion to Withdraw his guilty plea. Thus, there are no arguable legal points on the merits of this matter. Counsel's Motion to Withdraw is granted. The judgment of the Lake County Court of Common Pleas, denying Mull's Motion to Withdraw his guilty plea, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.